MERITA MERCHANT BANK SINGAPORE LTD A

v.

DEWAN BAHASA DAN PUSTAKA

FEDERAL COURT, PUTRAJAYA B
RAUS SHARIF PCA
ZALEHA ZAHARI FCJ
ZAINUN ALI FCJ
JEFFREY TAN FCJ
RAMLY ALI FCJ C
[CIVIL APPEAL NO: 02(f)-82-12-2013(W)]
11 NOVEMBER 2014

CONTRACT: *Assignment - Consent - Assignment of payment due by debtor - Whether debtor party to assignment - Non-assignment clauses in contract - Whether valid and binding on parties - Whether qualified by requirement for written consent - Whether consent main prerequisite before valid assignment could be made - Whether condition fulfilled - Whether assignment valid - Civil Law Act 1956, s. 4(3)* D

The respondent, Dewan Bahasa dan Pustaka ('DBP'), awarded three contracts to Benatulin Timur Sdn Bhd ('Benatulin') for the supply of paper and cardboard to DBP in 1996-1997, namely: (i) contract for Tender 3/96 and contract for Tender 7/96 up to 31 December 1996 ('1996 contracts'); and (ii) contract from 3 September 1997 ('1997 contract'). In order to honour its supply obligations to DBP, Benatulin sought a financing facility from the appellant, Merita Bank Singapore Ltd ('Merita'), and as security, Benatulin assigned all payments due to it by DBP to Merita. Clause 24 of the 1996 contracts and cl. 23 of the 1997 contract expressly provided that no assignment could be made without the prior written consent of DBP. Consequently, under the 1996 contracts, Benatulin had obtained a written consent from DBP for the payment due to it to be assigned to Merita and DBP had paid all the monies due under the 1996 contracts to Merita. After the expiry of the 1996 contracts, DBP issued purchase order to Benatulin *vide* letters P7, P8 and P9. It was *Merita*'s case that, pursuant to the letters, papers were supplied by Benatulin to DBP and invoices were issued thereunder with express endorsement for the cheques to be made payable to Merita. However, despite the endorsements, DBP had failed to make any payment to Merita. Merita contended that the purchases *vide* the letters were an E F G H I

A extension to Tender 3/96 of the 1996 contracts and that, at all material times, DBP treated the purchases post the 1996 contracts as nothing more than continuing purchases under the 1996 contracts. Thus, Merita claimed that DBP was obliged to make all payments due for the orders made under the letters. On
B the other hand, DBP stated that the purchases made *vide* the letters after the 1996 contracts were made pursuant to the 1997 contract which contained similar restrictions for subcontract and assignment as provided under the 1996 contracts. It was DBP's case that for the 1997 contract, Benatulin had applied for and
C obtained consent in writing of DBP for payments due to be paid to one Consolidated Forest Products Sdn Bhd ('CFP') which DBP did. In respect of the assignment executed by Benatulin ('P2'), it was DBP's case that, it had never consented to it. In the High Court, Merita's claim was allowed on the grounds that
D the supply made by Benatulin based on the letters P7, P8 and P9 was an extension of the 1996 contracts under Tender 3/96 and the assignment P2 was an absolute assignment. However, upon appeal by DBP, the Court of Appeal allowed DBP's appeal and set aside the High Court's decision holding that the assignment
E itself did not bear the assent of DBP as DBP was not party to it. The Court of Appeal further held that although Tender 3/96 was mentioned in the said letters, it did not necessarily make DBP a party to the assignment in P2 between Benatulin and Merita. Merita, thus, appealed against the judgment of the Court of
F Appeal on the question of law of whether, in the assignment under s. 4(3) of the Civil Law Act 1956 ('CLA'), the consent of the debtor was a legal requirement in order for the assignment to be valid in law.

G **Held (dismissing appeal with costs)**
Per Raus Sharif PCA delivering the judgment of the court:

(1) The non-assignment clauses appearing in both the 1996 contracts and the 1997 contract were valid and binding on
H both parties. The two clauses appearing in both contracts prohibiting assignment were not absolute in nature but qualified in the sense that once written consent is obtained, one party can still assign their rights and benefits under the contract. The non-assignment clauses expressly laid down that
I consent was a condition precedent before an assignment can be made. (para 31)

(2) It is trite that parties are free to enter into a contract with terms and conditions as they deem fit and these terms and conditions are binding on the parties who have, in the first place, agreed to be bound by it. The insertion of the non-assignment clauses as a term of the contract was not in contravention of s. 4(3) of the CLA. Instead, the non-assignment clauses and the element of consent thereunder formed an important term of the contract that the parties had agreed to. The term formed the main prerequisite before the other prerequisites under s. 4(3) of the CLA could be considered. Hence, there could be no valid assignment if the element of consent under the non-assignment clause was not fulfilled. (paras 31 & 32)

(3) Merita's reliance on P7, P8 and P9 was misconceived. Whilst P7, P8 and P9 made mention of Tender 3/96, this did not necessarily mean that DBP consented to the assignment of Benatulin's rights to Merita. The language used in the said letters did not support the submissions that DBP had acknowledged that the purchases made were an extension to the 1996 contracts *vide* Tender 3/96. The caption 'lanjutan kepada Tender 3/96' referred to details as to the purchases/order. It did not relate to the terms of the contract between DBP and Benatulin. P7, P8 and P9 must be viewed in accordance with DBP's letter of appointment of Benatulin wherein it was clearly stipulated that 'perlantikan syarikat tuan ini tertakluk kepada syarat-syarat sepertimana yang terkandung dalam perjanjian yang akan ditandatangani antara DBP dan tuan'. (para 38)

(4) The reference of Tender 3/96 in P7, P8 and P9 would have meant assurance of continuity in Benatulin's appointment and similar pattern of purchases as in Tender 3/96 subject to the terms of the contract which was to be executed *ie*, the 1997 contract. This was fortified based on the evidence of DW1 who had clearly and categorically stated that the supply for the 1997 contract did not form part of Tender 3/96, as no tender was called for in the 1997 supply. Hence, he had, in the said letters, referred to the earlier tender *ie*, Tender 3/96, so that Benatulin would be familiar with the terms of the new supply. (para 39)

(5) Since the element of consent was an important prerequisite, the fact that there existed an assignment between Merita and Benatulin did not strengthen Merita's case as the contract stipulated that consent by debtor (DBP) was a prerequisite before a valid assignment could be made. It was an implied term of the contract that there could be no assignment by Benatulin of its rights under the 1997 contract unless the prior written consent of DBP was obtained. An attempted assignment of contractual rights in breach of a contractual prohibition was ineffective to vest the contractual rights to Merita. (para 41)

(6) The purported assignment P2 which formed the basis of Merita's claim was dated and stamped on 22 April 1998 although notice of such an assignment was given to DBP as early as 23 August 1996. Since Benatulin had failed to secure DBP's consent, DBP was therefore not bound to honour Merita's request and had rightfully refused to recognise the instruction by Benatulin to make payment to Merita. The purported assignment by Benatulin to Merita without the consent of DBP constituted a breach of cl. 23 of the 1997 contract. Merita's claim as an assignee must therefore, fail. Further, Merita's claim against DBP could not be allowed as the payment due under the purchases made pursuant to the said letters had already been paid by DBP to Benatulin and CFP. (paras 42 & 43)

(7) It is trite law that an appellate court will not readily interfere with the findings of fact arrived at by the court of first instance to which the law entrust the primary duty of evaluation of the evidence. However, the appellate court is under a duty to intervene in a case where the trial court has so fundamentally misdirected itself. There was insufficient judicial appreciation by the HC judge of the pleadings and contemporaneous evidence in the instant case in allowing Merita's claim. The erroneous finding warranted appellate interference. (para 45)

Bahasa Malaysia *Translation Of Headnotes*

Responden, Dewan Bahasa dan Pustaka ('DBP'), mengawardkan tiga kontrak kepada Benatulin Timur Sdn Bhd ('Benatulin') bagi membekalkan kertas dan kadbod kepada DBP dalam tahun 1996-1997, iaitu: (i) kontrak bagi Tender 3/96 dan kontrak bagi Tender

7/96 sehingga 31 Disember 1996 ('kontrak-kontrak 1996'); dan (ii) kontrak dari 3 September 1997 ('kontrak 1997'). Untuk melaksanakan tanggungjawab pembekalan kepada DBP, Benatulin memohon kemudahan kewangan daripada perayu, Merita Bank Singapore Ltd ('Merita'), dan sebagai jaminan, Benatulin menyerah hak kesemua bayaran yang terhutang kepadanya oleh DBP kepada Merita. Klausa 24 kontrak-kontrak 1996 dan klausa 23 kontrak 1997 jelas memperuntukkan bahawa tiada penyerahan hak boleh dilakukan tanpa persetujuan bertulis terdahulu daripada DBP. Oleh itu, di bawah kontrak-kontrak 1996, Benatulin telah memperoleh persetujuan bertulis daripada DBP untuk pembayaran yang terhutang kepadanya diserah hak kepada Merita dan DBP telah membayar kesemua jumlah tertunggak di bawah kontrak-kontrak 1996 kepada Merita. Setelah kontrak-kontrak 1996 luput, DPB mengeluarkan perintah pembelian kepada Benatulin melalui surat-surat P7, P8 dan P9. Adalah kes Merita bahawa, berikutan surat-surat tersebut, kertas-kertas telah dibekalkan oleh Benatulin kepada DBP dan invois-invois telah dikeluarkan di bawahnya dengan pengendorsan langsung bagi cek-cek dibayar atas nama Merita. Tetapi, walaupun dengan adanya pengendorsan tersebut, DBP gagal membuat apa-apa bayaran kepada Merita. Merita menghujahkan bahawa pembelian-pembelian melalui surat-surat tersebut adalah lanjutan kepada Tender 3/96 kontrak-kontrak 1996 dan bahawa, pada setiap masa material, DBP melaksanakan pembelian-pembelian selepas kontrak-kontrak 1996 sebagai tidak lebih daripada penyambungan pembelian-pembelian di bawah kontrak-kontrak 1996. Dengan itu, Merita menuntut bahawa DBP bertanggungjawab untuk membuat kesemua bayaran tertunggak bagi pesanan-pesanan di bawah surat-surat tersebut. Sebaliknya, DBP menyatakan bahawa pembelian-pembelian yang dibuat melalui surat-surat selepas kontrak-kontrak 1996 dibuat menurut kontrak 1997 yang mengandungi sekatan serupa bagi sub-kontrak dan penyerahan hak seperti yang diperuntukkan di bawah kontrak-kontrak 1996. Adalah kes DBP bahawa bagi kontrak 1997, Benatulin telah memohon dan memperoleh persetujuan bertulis DBP bagi bayaran-bayaran tertunggak dibayar kepada Consolidated Forest Products Sdn Bhd ('CFP') yang telah dibayar oleh DBP. Berkaitan dengan penyerahan hak yang dimeterai oleh Benatulin ('P2'), adalah kes DBP bahawa ia tidak pernah memberikan persetujuan baginya. Di Mahkamah Tinggi, tuntutan Merita dibenarkan atas alasan-alasan bahawa pembekalan yang dibuat oleh Benatulin berdasarkan kepada surat-surat P7, P8 dan

P9 adalah lanjutan kepada kontrak-kontrak 1996 di bawah Tender 3/96 dan penyerahan hak P2 adalah satu penyerahan hak mutlak. Walau bagaimanapun, atas rayuan oleh DBP, Mahkamah Rayuan membenarkan rayuan DBP dan mengenepikan keputusan Mahkamah Tinggi dengan memutuskan bahawa penyerahan hak itu sendiri tidak mengandungi persetujuan DBP kerana DBP bukan pihak kepadanya. Mahkamah Rayuan selanjutnya memutuskan bahawa walaupun Tender 3/96 disebut dalam surat-surat tersebut, ia tidak semestinya menjadikan DBP pihak kepada penyerahan hak P2 antara Benatulin dan Merita. Merita, oleh itu, merayu terhadap penghakiman Mahkamah Rayuan atas persoalan undang-undang sama ada, dalam penyerahan hak di bawah s. 4(3) Akta Undang-Undang Sivil 1956 ('Akta'), persetujuan penghutang adalah suatu keperluan di sisi undang-undang untuk menjadikan penyerahan hak sah.

Diputuskan (menolak rayuan dengan kos)
Oleh Raus Sharif PMR menyampaikan penghakiman mahkamah:

(1) Klausa-klausa yang terdapat dalam kontrak-kontrak 1996 dan kontak 1997 adalah sah dan mengikat kedua-dua pihak. Kedua-dua klausa yang terdapat dalam kedua-dua kontrak yang melarang penyerahan hak adalah tidak bersifat mutlak tetapi bersyarat di mana sebaik sahaja persetujuan bertulis diperolehi, salah satu pihak masih boleh menyerahkan hak-hak dan kepentingan-kepentingan mereka di bawah kontrak tersebut. Klausa melarang penyerahan hak jelas memperuntukkan bahawa persetujuan adalah syarat awalan sebelum penyerahan hak boleh dibuat.

(2) Adalah matan bahawa pihak-pihak adalah bebas untuk memasuki kontrak dengan terma-terma dan syarat-syarat yang mereka anggap sesuai dan terma-terma dan syarat-syarat tersebut adalah mengikat pihak-pihak yang telah pada mulanya bersetuju untuk terikat dengannya. Kemasukan klausa melarang penyerahan hak sebagai terma kontrak tidak bercanggah dengan s. 4(3) Akta. Sebaliknya, klausa melarang penyerahan hak tersebut dan elemen persetujuan di bawahnya membentuk terma penting bagi kontrak yang pihak-pihak telah pun menyetujuinya. Terma tersebut membentuk pra-syarat penting sebelum prasyarat-prasyarat lain di bawah s. 4(3) Akta boleh dipertimbangkan. Dengan itu, tidak boleh ada penyerahan hak yang sah jika elemen-elemen persetujuan di bawah larangan penyerahan hak tidak dipenuhi.

(3) Sandaran Merita ke atas P7, P8 dan P9 adalah salah tanggap. Sementara P7, P8 dan P9 menyebut tentang Tender 3/96, ini tidak semestinya bermaksud bahawa DBP bersetuju dengan penyerahan hak Benatulin kepada Merita. Bahasa yang digunakan dalam surat-surat tersebut tidak menyokong hujahan bahawa DBP telah mengakui bahawa pembelian-pembelian tersebut adalah lanjutan kepada kontrak-kontrak 1996 melalui Tender 3/96. Kapsyen 'lanjutan kepada Tender 3/96' merujuk kepada butir-butir berkaitan pembelian-pembelian/pesanan. Ia tidak berkait dengan terma-terma kontrak antara DBP dan Benatulin. P7, P8 dan P9 perlu dipertimbangkan menurut surat perlantikan oleh DBP kepada Benatulin di mana adalah jelas dinyatakan bahawa 'perlantikan syarikat tuan ini tertakluk kepada syarat-syarat sepertimana yang terkandung dalam perjanjian yang akan ditandatangani antara DBP dan tuan'.

(4) Rujukan kepada Tender 3/96 dalam P7, P8 dan P9 akan membawa maksud jaminan penyambungan dalam perlantikan Benatulin dan corak pembelian yang serupa seperti dalam Tender 3/96 tertakluk kepada terma-terma kontrak yang akan ditandatangani iaitu kontrak 1997. Ini diperkukuhkan berdasarkan keterangan DW1 yang jelas dan secara mutlak menyatakan bahawa pembekalan bagi kontrak 1997 tidak membentuk sebahagian Tender 3/96, kerana tidak ada tender yang dipanggil bagi pembekalan bagi 1997. Dengan itu, dia telah, dalam surat-surat tersebut, merujuk kepada tender sebelumnya iaitu Tender 3/96, supaya Benatulin boleh membiasakan diri dengan terma-terma bekalan yang baru.

(5) Oleh sebab elemen persetujuan adalah prasyarat penting, fakta bahawa wujud penyerahan hak antara Merita dan Benatulin tidak memperkukuhkan kes Merita kerana kontrak tersebut menyatakan bahawa persetujuan penghutang (DBP) adalah prasyarat sebelum penyerahan hak yang sah boleh dibuat. Adalah terma tersirat kontrak tersebut bahawa tidak boleh ada penyerahan hak oleh Benatulin bagi hak-haknya di bawah kontrak 1997 kecuali dengan memperolehi persetujuan bertulis DBP. Percubaan penyerahan hak bagi hak-hak kontrak dalam kemungkiran larangan kontrak adalah tidak berkesan untuk meletakhakkan hak-hak kontrak kepada Merita.

(6) Penyerahan hak P2 yang didakwa membentuk asas tuntutan Merita adalah bertarikh dan disetemkan pada 22 April 1998 walaupun notis bagi penyerahan hak tersebut diberikan kepada

DBP seawal 23 Ogos 1996. Oleh sebab Benatulin telah gagal memperoleh persetujuan DBP, DBP oleh itu tidak terikat untuk memenuhi permintaan Merita dan telah dengan betul menolak untuk mempertimbangkan arahan Benatulin untuk membuat bayaran kepada Merita. Penyerahan hak yang dinyatakan oleh Benatulin kepada Merita tanpa persetujuan DBP membentuk pelanggaran klausa 23 kontrak 1997. Tuntutan Merita sebagai pemegang serah hak oleh itu, gagal. Selanjutnya, tuntutan Merita terhadap DBP tidak boleh dibenarkan kerana bayaran yang tertunggak di bawah pembelian-pembelian yang dibuat menurut surat-surat tersebut telahpun dibayar oleh DBP kepada Benatulin dan CFP.

(7) Adalah undang-undang matan bahawa mahkamah rayuan tidak akan sewenang-wenangnya campur tangan dengan dapatan fakta yang dicapai oleh mahkamah yang membicarakan yang mana undang-undang mengamanahkan kewajipan asas untuk meneliti keterangan. Walau bagaimanapun, mahkamah rayuan mempunyai kewajipan untuk campur tangan dalam kes di mana mahkamah bicara telah tersalah arah pada asasnya. Wujud kekurangan pertimbangan kehakiman oleh Hakim Mahkamah Tinggi terhadap pliding-pliding dan keterangan semasa dalam kes ini dalam membenarkan tuntutan Merita. Dapatan yang khilaf tersebut mewajarkan campur tangan rayuan.

Case(s) referred to:

Hendry v. Chartsearch Ltd [1998] CLC 1382 ***(refd)***

Lam Hong Hardware Co Sdn Bhd v. Incacon Sdn Bhd & Yang Lain [2006] 2 CLJ 1129 CA ***(refd)***

Linden Gardens Trust Ltd v. Lenesta Sludge Disposals Ltd and Others and Another Appeal [1993] 3 All ER 417 ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 4(3)

Other source(s) referred to:

RM Goode, *Legal Problems of Credit and Security*, 2nd edn, 1988, p 123

For the appellant - Ong Chee Kwan; M/s Christopher & Lee Ong
For the respondent - J Doshi; M/s Abdullah & Zainudin

[Appeal from Court of Appeal; Civil Appeal No: W-02-1324-2010]

Reported by S Barathi

JUDGMENT

Raus Sharif PCA:

Introduction

[1] This is an appeal against the judgment of the Court of Appeal dated 28 March 2013 which allowed the second defendant's appeal against the decision of the High Court with costs. At the High Court the plaintiff, Merita Merchant Bank Singapore Ltd ("Merita") sued the second defendant, Dewan Bahasa Dan Pustaka ("DBP") as an assignee of certain debts due and payable by DBP to the first defendant, Benatulin Timur Sdn Bhd ("Benatulin") who had supplied printing papers to DBP.

[2] On 6 April 2010, the learned High Court Judge after a full trial allowed Merita's claim against DBP and entered judgment in the sum of RM6,206,547.62 and RM584,000 with interest and costs. Earlier, Merita had, on 14 August 2008 obtained a judgment in default against Benatulin for the sum of RM2,235,768.58.

[3] On 21 November 2013, this court granted Merita leave to appeal on a sole question of law which reads as follows:

> In the assignment under Section 4(3) of the Civil Law Act 1956, whether consent of the Debtor is a legal requirement in order for the assignment to be valid in law.

Background Facts

[4] In 1996-1997, DBP awarded three contracts to Benatulin for the supply of paper and cardboard to DBP, namely:

(a) Contract for Tender 3/96 (D-21) and contract for Tender 7/96 (D-22) up to 31 December 1996 ("1996 contracts"); and

(b) Contract from 3 September 1997 (D-28) ("1997 contract")

[5] In order to honour its supply obligations to DBP, Benatulin sought a financing facility from Merita, and as security, Benatulin assigned all payments due to it by DBP to Merita.

[6] The contracts between DBP and Benatulin expressly provided under cl. 24 in the 1996 contracts and cl. 23 in the 1997 contract that no assignment could be made without the prior written consent of DBP. Clause 24 and cl. 23 which were similarly worded expressly provides as follows:

A 24 SUBKONTRAK, SERAH HAK DAN LAIN-LAIN

24.1 Kontraktor tidak boleh mensubkontrakkan Perjanjian ini atau mana-mana bahagiannya dengan tidak terlebih dahulu mendapat persetujuan bertulis DEWAN DENGAN SYARAT BAHAWA kelulusan sedemikian itu jika diberikan oleh Dewan hendaklah tidak
B menyentuh atau meluputkan kewajipan dan tanggungan Kontraktor kepada Dewan dibawah Perjanjian ini dan DENGAN SYARAT SELANJUTNYA Kontraktor hendaklah bertanggungjawab terhadap apa-apa kesalahan, kegagalan, kemungkiran, kecuaian dan kelalaian pihak yang kepadanya subkontrak diberikan.

C

24.2 Kontraktor tidak boleh memindah milik Perjanjian ini atau mana-mana bahagiannya, menyerahhak, menggadai janji, menggadai atau apa-apa juga wang yang kena dibayar kepada Kontraktor di bawah Perjanjian ini dan apa-apa faedah yang terbit darinya dengan tidak terlebih dahulu mendapat kelulusan bertulis Dewan
D DENGAN SYARAT BAHAWA kelulusan sedemikian itu jika diberikan oleh Dewan hendaklah tidak menyentuh atau meluputkan kewajipan dan tanggungan Kontraktor kepada Dewan dibawah Perjanjian ini.

E **[7]** In the context of the above contracts the words "Dewan" referred to DBP and "Kontraktor" referred to Benatulin. From the above clause, it could be surmised that:

(a) There could be no assignment of rights by Benatulin under the contract without the prior written consent of DBP. The prior
F written consent was a pre-condition to any assignment of the benefits under the contract; and

(b) In the event the written consent was given, such consent could not affect the responsibilities and liabilities of the
G contractor, ie, Benatulin, pursuant to the contract.

[8] Under the 1996 contracts, Benatulin had obtained a written consent from DBP (exh. P3 and D24 for Tender 3/96 and exh. P4 for Tender 7/96) for the payment due to it to be assigned to Merita. Pursuant to the consent obtained, all monies due under
H the 1996 contracts were paid by DBP to Merita.

[9] All was well between the parties until 1998, when Merita filed a civil suit against Benatulin and DBP to claim for payments for purchases made after the 1996 contracts.

I

[10] It is not in dispute that after the expiry of the 1996 contracts DBP issued purchase orders to Benatulin *vide* the following letters:

(i) Letter dated 2 June 1997 (P7);

(ii) Letter dated 11 July 1997 (P8); and

(iii) Letter dated 7 August 1997 (P9) (the said letters)

[11] It is Merita's case that pursuant to the said letters, papers were supplied by Benatulin to DBP and invoices were issued thereunder with express endorsement for the cheques to be made payable to Merita. However despite the endorsements in the said invoices DBP had failed to make any payment to Merita. It is Merita's case that the aforesaid purchases *vide* the said letters were an extension to Tender 3/96 of the 1996 contracts. Merita took the position that at all times, DBP treated the purchases post the 1996 contracts as nothing more than continuing purchases under the 1996 contracts. In these circumstances, Merita claimed that DBP was obliged to make all payments due for the orders made under the said letters to Merita.

[12] In supporting its claim Merita relied on DBP's letter dated 2 June 1997 (P7) wherein DBP confirmed that Benatulin's re-appointment as a supplier for the year 1997 was an extension of Tender 3/96 of the 1996 contract. Further Merita relied on the undated assignment (P2) stamped on 22 April 1998 which was executed between Benatulin and Merita wherein all of Benatulin's rights under the contracts executed between DBP and Benatulin were to be assigned to Merita. Thus, it was contended that the assignment (P2) was an absolute assignment wherein it expressly stated that Benatulin agreed to and has irrevocably and unconditionally assigned, transferred and set-over to Merita all its rights, title and interest of all contracts entered between DBP and Benatulin.

[13] In its defence DBP maintained that the purchases made *vide* the said letters after the 1996 contracts were made pursuant to the 1997 contract. As we have said earlier, in the 1997 contract which was executed between DBP and Benatulin on 3 September 1997, there was a similar restriction for subcontract and assignment as was provided under cl. 24 of the 1996 contracts. The said restriction was laid down under cl. 23 of the 1997

A contract wherein it was a precondition that Benatulin must get the written consent from DBP before any assignment of Benatulin's rights and benefits under the contract could be made.

[14] It is DBP's case that for the 1997 contract, Benatulin had B applied for and obtained the consent in writing of DBP for payments due to be paid to one Consolidated Forest Products Sdn Bhd ("CFP"). The written consent of DBP was given by a letter dated 10 October 1997 (P41). In accordance with the consent given, DBP was to pay the monies to CFP until notified C otherwise. It is DBP's case that payments were made to CFP under the 1997 contract.

[15] In respect of the assignment executed by Benatulin, it is DBP's case that it never consented to it. Thus, it is DBP's case that the payments for the 1997 contract was made to CFP for D which Benatulin had applied for and obtained DBP's consent. It would therefore be wrong and unjust for DBP to pay again for the same purchases.

At The High Court

E

[16] The learned trial judge after a full trial allowed Merita's claim against DBP. The learned trial judge held that the supply made by Benatulin based on the said letters was an extension of the 1996 contracts under Tender 3/96. The learned trial judge also F held that the assignment at exh. P2 was an absolute assignment; and, was not limited to any particular contract. It covered all supplies under the said letter which was binding on Merita, Benatulin and DBP.

At The Court Of Appeal

G

[17] The Court of Appeal allowed DBP's appeal and set aside the learned trial judge's orders. Essentially the Court of Appeal held that the learned trial judge erred when she overlooked the undisputed fact that the assignment itself did not bear the assent H of DBP. DBP was not a party to it. The Court of Appeal found that although Tender 3/96 was mentioned in the said letters which Merita had predicated its claim, it did not necessarily make DBP a party to the assignment in P2 between Benatulin and Merita. The fact that the purported assignment was not dated and was I only stamped about a month after the writ was filed supports the conclusion that no copy of the undated assignment was served on

DBP and was kept by Merita. As for the two notices of the assignment given by Merita to DBP, the Court of Appeal held that the notices in their plain and literal meaning only gave notice of the payments due under the respective contracts. The language used in the notices did not reflect the express language used in the undated assignment, ie, that it was an assignment of payment for all the respective contracts.

At The Federal Court

[18] Before us learned counsel for Merita submitted that s. 4(3) of the Civil Law Act 1956 ("CLA") provided that a legal assignment is valid once the assignment is made in writing and notice of the same had been given to the debtor. As such learned counsel highlighted that there is no necessity for the assignor to obtain the consent of the debtor before a legal assignment can be made. Based on the facts, learned counsel argued that a proper notice of assignment in writing had been given by Merita to DBP and that fulfilled the requirement for a valid and binding assignment to take effect under s. 4(3) of the CLA. Learned counsel further submitted that since consent is not a prerequisite for an assignment to be valid and binding on the parties, the non-assignment clauses which appeared in the 1996 contracts and the 1997 contract as in this case was in effect a contravention of s. 4(3) of the CLA.

[19] DBP took the position that the element of consent is a prerequisite before any legal assignment of the benefits under the 1996 contracts and 1997 contract, could be assigned. This was clearly stipulated under the non-assignment clauses as appears in cl. 24 of the 1996 contracts and cl. 23 of the 1997 contract that Benatulin could not assign any part of the contract, any monies under the contract and any of the benefits under the contract without the consent of DBP. Since Benatulin failed to obtain consent for the assignment of the benefits for the purchases made under the said letters ie, the 1997 contract which Merita had based its claim on, any purported assignment as between Benatulin and Merita was unenforceable against DBP.

Findings

[20] Thus, the issue for us to determine is whether consent of the debtor is a legal requirement in order for an assignment to be valid in law under s. 4(3) of the CLA. In this case, it is not in

dispute that there was a restriction imposed against Benatulin to subcontract or assign their rights under the two contracts, ie, the 1996 contracts and 1997 contract *vide* cl. 24 and cl. 23 for which both DBP and Benatulin agreed to be bound. The restriction on the assignment of the contractual rights and benefits in both the contracts spelt out in no uncertain terms that Benatulin could not assign or transfer any part of the contract, any monies and benefits under the contract without the prior written consent of DBP.

[21] We agree with the submission of Merita on this point in that consent of the debtor is not a precondition under s. 4(3) of the CLA. Section 4(3) of the CLA provides that:

> Any absolute assignment, by writing under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, shall be, and be deemed to have been, effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed in the State before the date of the coming into force of this Act, to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.

[22] The pivotal issue here is however whether one party to a contract can unilaterally proceed to assign the rights and benefits under the contract despite having agreed to be bound mutually by a non-assignment clause which clearly stipulated that consent was a precondition before a valid assignment could be effected? This brings into focus another issue ie, whether consent under a non-assignment clause is a precondition before an assignment can be valid notwithstanding the fact that this is not clearly spelt out under s. 4(3) of the CLA. Against the backdrop of these issues, we are to determine whether the non-assignment clauses and the requirement for consent as incorporated in the 1996 contracts and the 1997 contract in the present case are valid in law.

[23] Perhaps it would be opportune for us first to deal on the concept of non-assignment clauses and what it entails as a legal mechanism of some consequence. In practice, non-assignment clauses are very common in modern commercial contracts, often

drafted for the benefit of both parties. Prohibitions on assignment derive from a concern that the debtor should not be required to perform the contract for anyone other than the party to the contract. This is their commercial objective. Further the non-assignment clause is subject to terms as agreed between the parties. As such that term must be binding on both of the parties. The effect of the prohibition depends on the construction of the prohibition clause in the contract. The prohibition may not be absolute, for example, a term that one party is not to assign the contract without the consent of the other. "If a contract contains a term prohibiting assignment, any purported assignment in breach of that prohibition made by one party of his contractual rights or of his rights arising under the contract will be ineffective as against the other party to the contract. It may however create rights between the assignor and assignee." (see *Law of Assignment* by AG Guest, 1st edn. 2012)

[24] The English courts seemed to support the above proposition in that an assignment which was made in contravention of the non-assignment clause was unenforceable against the debtor. The leading case on this point is *Linden Gardens Trust Ltd v. Lenesta Sludge Disposals Ltd and Others and Another Appeal* [1993] 3 All ER 417 where the House of Lords held that a contractual prohibition *vide* cl. 17 on the non-assignment of the benefit of a contract is not contrary to public policy. The House of Lords held that prohibitions of such nature are, therefore, enforceable. His Lordship Lord Browne-Wilkinson had this to say:

> In my judgment clause 17 clearly prohibits the assignment of any benefit of or under the contract. It therefore follows the purported assignment to Linden Garden without the consent of the contractor constituted a breach of clause 17. The claim of Linden Gardens as assignee must therefore fail unless it can show that the prohibition in clause 17 was either void or contrary to public policy or, notwithstanding the breach of clause 17, the assignment was effective to assign the chose in action to Linden Garden.

[25] In *Hendry v. Chartsearch Ltd* [1998] CLC 1382 the English Court of Appeal reiterated its earlier stance in *Linden Gardens* when it held that where an assignment of contractual rights was prohibited without the prior written consent of the other party, there could be no valid assignment where the consent was not sought before the assignment was made.

[26] Text book authors have also lent credence to this proposition in their books. RM Goode in his book *Legal Problems of Credit and Security* (2nd edn., 1988) at p. 123 had this to say:

> ... It is equally clear that a contractual provision against assignment entitles the debtor to refuse to deal with the assignee and to continue making payment to the assignor, so that the assignment is not capable of taking effect as a statutory assignment. Further a purported assignment by the original creditor would place him in breach of contract and entitle the debtor to exercise any remedies for breach of contract given by the agreement and the law. In short, the prohibition is effective as between the debtor and the assignee, and if the assignee brings proceedings his claim will be dismissed.

[27] *Chitty on Contracts* (26th edn.) vol. 1 at para. 1413 also expressed a similar view in that:

> If rights arising under a contract are declared by the contract to be incapable of assignment, it seems that any purported assignment will be invalid against the debtor:

[28] AG Guest in his book *The Law of Assignment* (1st edn.-2012) stated that:

> lf a contract contains a term prohibiting assignment, any purported assignment in breach of that prohibition made by one party of his contractual rights or of his rights arising under the contract will be ineffective as against the other party.

[29] The learned author further added that:

> The question whether and to what words of prohibition have the effect of prohibiting assignment is to be determined by construing the terms of the prohibition.

[30] Closer to home the Court of Appeal in the case of *Lam Hong Hardware Co Sdn Bhd v. Incacon Sdn Bhd & Yang Lain* [2006] 2 CLJ 1129; [2006] 4 MLJ 531 in its majority decision took a similar stance when it held that:

> Di dalam rayuan ini sekarang, fasal 17 Articles of Documents jelas melarang responden pertama menyerahhak apa-apa bayaran kepada pihak ketiga tanpa kebenaran bertulis daripada responden ketiga. Dengan itu, suratikatan serahhak di antara responden pertama dengan pencelah tanpa kebenaran bertulis adalah tidak sah. Dengan itu, responden ketiga tidak tertambat dengan suratikatan serahhak tersebut. Ini dikuatkan oleh peruntukan fasal 3.09 Articles of Documents.

[31] We share the same view. On the facts of this case, we find that the non-assignment clauses appearing in both the 1996 contracts and the 1997 contract were valid and binding on both parties. The two clauses appearing in both contracts prohibiting assignment were not absolute in nature but qualified in the sense once written consent is obtained one party can still assign their rights and benefits under the contract. The non-assignment clauses here expressly laid down that consent was a condition precedent before an assignment can be made. In our judgment, we find that the insertion of the non-assignment clauses as a term of the contract is not in contravention of s. 4(3) of the CLA. The non-assignment clause which made consent a precondition before the debts could be assigned did not operate to invalidate the assignment contract as it was a term agreed upon by both parties when they entered into the contract. It is trite that parties are free to enter into a contract with terms and conditions as they deem fit and these terms and condition are binding on the parties who have in the first place agreed to be bound by it. Thus, we hold that there could be no valid assignment if the element of consent under the non-assignment clause is not fulfilled. It was a well-established principle sanctioned by the doctrine of sanctity of contract that parties who make agreement must adhere to their terms.

[32] In our judgment, on the facts of this case, we are unable to accede to the arguments urged upon us by learned counsel for Merita that since a proper notice of assignment in writing had been given by Merita to DBP, it fulfilled the requirement for a valid and binding assignment to take effect under s. 4(3) of the CLA. As we have said earlier the element of consent is a prerequisite before a valid assignment can be made. Thus, the requirements under s. 4(3) of the CLA 1956 with regard to a legal assignment only comes into play if the contract is assignable or the restriction to assign is fulfilled. In the instant case the non-assignment clauses and the element of consent thereunder formed an important term of the contract that parties have agreed. That formed the main prerequisite before the other prerequisites under s. 4(3) of the CLA could be considered.

[33] The next issue which begs our consideration is whether DBP's consent was indeed obtained by Benatulin prior to the assignment of their rights and benefits of Benatulin's contract with DBP to Merita. For this purpose, we must examine the conduct of the parties and the events that led to this dispute. From the

A contemporaneous documents referred to by learned counsel for DBP and Merita, we observe the following:

(a) For the 1997 contract, DBP had *vide* letter dated 30 April 1997 appointed Benatulin as the supplier with a condition that
B expressly provides as follows:

> Adalah dimaklumkan bahawa perlantikan syarikat tuan ini tertakluk kepada syarat-syarat sepertimana yang terkandung di dalam perjanjian yang akan ditandatangani di antara Dewan Bahasa dan Pustaka dengan pihak tuan kelak.

C

(b) Benatulin accepted the appointment and the 1997 contract was duly executed on 3 September 1997. The 1997 contract came into effect from 3 August 1997. The non-assignment clause was stipulated under cl. 23.

D

(c) For the 1997 contract, Benatulin had applied for and obtained the consent in writing from DBP in accordance with cl. 23 of the 1997 contract for all monies to be paid to one party known as Consolidated Forest Products (CFP). DBP's consent letter dated 10 October 1997 is exhibited as P41.

E

(d) Benatulin reaffirmed their position *vide* letter dated 27 October 1997 (D44) to DBP stating that all payments were to be made to CFP. Particulars of the invoices were attached together with the said letter.

F

(e) DBP replied *vide* letter dated 7 November 1997 affirming the invoices to be paid to CFP.

(f) CFP had thereafter issued a letter dated 26 February 1998 for DBP to release all monies due under the 1997 contract to
G Benatulin. DBP accordingly released the said monies to Benatulin.

[34] It is surprising to note that notwithstanding the arrangement between DBP and Benatulin for the assignment of their rights
H under the 1997 contract to CFP, Benatulin had *vide* letter dated 25 February 1998 written to DBP revoking its instruction in the earlier letters ie, payments to be made to CFP and directed DBP to make all payments to Merita. What prompted them to do this?

I **[35]** The problem lies with regard to the purchases made by DBP *vide* the said letters issued at different dates before the formal execution of the 1997 contract. The dispute here was this: Merita had placed reliance on the said letters to say that DBP's

purchases were an extension of the 1996 contract *vide* Tender 3/96. Pursuant thereto Merita took the position that based on the assignment in P2, that was executed between them and Benatulin all payments due for the purchases made under the said letters must be made to them and not CFP.

[36] The letters relied upon by Merita can be deduced hereunder: Bullet 36.1 Letter dated 2 June 1997 (P7) from DBP to Benatulin; Bullet 36.2 Letter dated 11 July 1997 (P8) from DBP to Benatulin; and Bullet 36.3 Letter dated 7 August 1997 (P9) from DBP to Benatulin.

[37] Learned counsel for Merita highlighted that the said letter dated 2 June 1997 from DBP to Benatulin (P7) contained a notification stating that "perlantikan semula syarikat tuan adalah sebagai lanjutan kepada kontrak pembekalan Tender 3/96." Hence, it was for this reason Merita took the position that the purchases made thereunder was subject to the 1996 contract and not the 1997 contract. Merita also submitted that since the aforesaid letter clearly stated that Benatulin's appointment was as an extension to Tender 3/96, DBP was at all times aware that the purchases were made under the 1996 contract.

[38] In our judgment we find Merita's reliance on P7, P8 and P9 to be misconceived. Whilst we do accept that P7, P8 and P9 made mention of Tender 3/96, however we find that this did not necessarily mean that DBP consented to the assignment of Benatulin's rights to Merita. The language used in the said letters did not support the submissions made by learned counsel for Merita that DBP had acknowledged that the purchases made were an extension to the 1996 contract *vide* Tender 3/96. The caption "lanjutan kepada Tender 3/96" referred to details as to the purchases/orders. It did not relate to the terms of the contract between DBP and Benatulin. We are of the view that P7, P8 and P9 must be viewed in accordance with DBP's letter of appointment dated 30 April 1997 of Benatulin wherein it was clearly stipulated that "*perlantikan syarikat tuan ini! tertakluk kepada syarat-syarat sepertimana yang terkandung dalam perianjian yang akan ditandatangani antara DBP dan tuan*". (emphasis added)

[39] The above phrase in italics which we have emphasised in our view to be crucial. It is conceivable that the contract referred to which was to be signed at a later date must be the 1997 contract. Thus, the reference of Tender 3/96 in P7, P8 and P9 would have meant the assurance of continuity in Benatulin's

appointment and similar pattern of purchases as in Tender 3/96 subject to the terms of the contract which was to be executed ie, the 1997 contract. We are fortified in coming to this conclusion based on the evidence of DW1 who had clearly and categorically stated that the supply for the 1997 contract did not form part of Tender 3/96, as no tender was called for the 1997 supply, hence he had in the said letters, referred to the earlier tender ie, Tender 3/96, so that Benatulin would be familiar with the terms of the new supply.

[40] In so far as the purported assignment in P2 which formed the basis of Merita's claim, Merita took the position that DBP was put to notice of the said assignment between Benatulin and Merita *vide* the notice of assignment served on DBP on 27 February 1998. In fact, Merita submitted that notice of assignment had been given by Merita to DBP as early as 23 August 1996 in their letter to DBP of Benatulin's assignment of rights. Merita also placed reliance on the invoices to substantiate their contention.

[41] We have subjected these documents to scrutiny. With respect we are unable to agree with Merita's contentions. Since it is our finding that the element of consent is an important prerequisite, the fact that there existed an assignment between Merita and Benatulin did not strengthen Merita's case as the contract stipulated that consent by the debtor (DBP) was a prerequisite before a valid assignment could be made. Nowhere did Merita highlight to us that this has been adhered to. At the risk of repeating ourselves, we reiterate here that it is an implied term of the contract that there could be no assignment by Benatulin of its rights under the 1997 contract unless the prior written consent of DBP was obtained. An attempted assignment of contractual rights in breach of a contractual prohibition was ineffective to vest the contractual rights in Merita.

[42] Further, it is significant to note that the purported assignment P2 which formed the basis of Merita's claim was dated and stamped on 22 April 1998 although notice of such an assignment was given to DBP as early as 23 August 1996. On this issue the Court of Appeal found that since the assignment at P2 was dated and stamped at a much later date supported the conclusion that the purported assignment in P2 was not served on DBP.

[43] In our judgment, the point of critical importance was not whether notice of assignment was given to DBP but whether Benatulin had obtained DBP's consent before executing the assignment with Merita. As we have alluded to earlier since Benatulin had failed to secure DBP's consent, hence DBP was, therefore, not bound to honour Merita's request and had rightfully refused to recognise the instruction by Benatulin to make payment to Merita. The purported assignment which lacked the consent of DBP for the purchases made under the said letters were unenforceable against DBP. It follows that the purported assignment by Benatulin to Merita without the consent of DBP constituted a breach of cl. 23 of the 1997 contract. Merita's claim as an assignee must, therefore, fail. Further, this court cannot allow Merita's claim against DBP as the payment due under the purchases made pursuant to the said letters had already been paid by DBP to Benatulin and CFP.

[44] To sum up, the irresistible conclusion that can be drawn based on facts and circumstances is that P2 was executed by Benatulin and Merita in clear breach of cl. 23 of the 1997 contract wherein it was clearly stipulated in no uncertain terms that Benatulin must obtain the consent in writing from DBP before they could assign all of their rights under the contract. Since no consent in writing was obtained from DBP by Benatulin for it to assign its rights under the 1997 contract, DBP was not bound by the assignment in P2 to make any payment to Merita. Applying the principles of law discussed in the preceding paragraphs we hold that the purported assignment in P2 was not binding on DBP. Based on the facts before us we find that the existence of such consent by DBP was wanting. On the other hand, the undisputed facts clearly supported DBP's defence in that based on the consent given to Benatulin for the assignment of the contractual rights under the 1997 contract monies were duly paid to Benatulin in the sum of RM2,235,768.58 and to CFP in the sum of RM6,258,787.86. Thus, was unjust for Merita to initiate proceedings against DBP for payments that have already been made.

[45] It is trite law that an appellate court will not readily interfere with the findings of fact arrived at by the court of first instance to which the law entrust the primary duty of evaluation of the evidence. However, the appellate court is under a duty to intervene in a case where the trial court has so fundamentally misdirected itself. In our judgment, we find that there was

A insufficient judicial appreciation by the learned trial judge of the pleadings and contemporaneous evidence in the instant case when she allowed Merita's claim. Such erroneous finding warranted appellate interference which the Court of Appeal rightfully done so, and we have no reason to disagree. We agree with the Court
B of Appeal in finding that the learned trial judge erred in finding that the supply made by Benatulin based on the said letters were an extension of the 1996 contracts. We find that the purchases made by DBP *vide* the said letters were within the ambit of the 1997 contract. The trial judge erred in facts and law when she
C held that the purchases made by DBP *vide* the said letters was a continuation under the 1996 contracts pursuant to Tender 3/96. The fact of the matter is that the judgment sum as adjudged by the trial judge were monies under the 1997 contract for which DBP had duly made payments to Benatulin and CFP. The learned
D trial also erred when she concluded that P2 was an absolute assignment and was not confined to any particular contract. The error of the learned trial judge became more pronounced when she held that the assignment in P2 was binding upon Benatulin, Merita and DBP when in actual fact DBP never consented nor
E were they privy to the assignment in P2.

[46] Under the circumstances, we hereby answer the question of law posed in this appeal in the negative. Based on the facts and circumstances of the case, we hold that consent was a
F prerequisite before a valid and lawful assignment could be made as under the non-assignment clauses, consent formed an important term of the contract which was binding on both the parties. For the above-stated reasons, this appeal is dismissed with costs.

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